SUPREME COURT, U.S.
FILED
FEB 29 2016
OFFICE OF THE CLERK

No. 15-458

In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCTOBER 9, 2015
CERTIORARI GRANTED: JANUARY 19, 2016

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The following opinions, judgments, verdict forms, and transcripts have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari:

Appendix A:	Court of appeals opinion, July 24, 2015
Appendix B:	District court judgment, Apr. 18, 2013
Appendix C:	District court verdict form, Apr. 17, 2013
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Appendix F:	District court verdict form no. 2, Apr. 18, 2013

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35377

ROCKY DIETZ, Plaintiff-Appellant

v.

HILLARY BOULDIN, Defendant-Appellee

DOCKET ENTRIES

DATE	DKT NO.	PROCEEDINGS
05/03/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 05/10/2013. Transcript ordered by 06/03/2013. Transcript due 07/01/2013 Appellant Rocky Dietz opening brief due 08/12/13. Appellee Hillary Bouldin answering brief due 09/11/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8614630] (GR)

		[Entered: 05/03/2013 08:23 AM]
		* * * * *
11/04/2013	9	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Rocky Dietz. Date of service: 11/04/2013. [8848652] (Angel, Geoffrey) [Entered: 11/04/2013 12:42 PM]
		* * * * *
12/31/2013	17	Submitted (ECF) Answering Brief and excerpts of record for review. Submitted by Appellee Hillary Bouldin. Date of service: 12/31/2013. [8920815] (Beaudette, Jesse) [Entered: 12/31/2013 11:00 AM]
		* * * * *
02/13/2014	23	Submitted (ECF) Reply Brief for review. Submitted by Appellant Rocky Dietz. Date of service: 02/13/2014. [8978125] (Angel, Geoffrey) [Entered: 02/13/2014 01:52 PM]
		* * * * *
01/26/2015	29	Filed clerk order (Deputy Clerk: SM): The parties are invited to submit supple-

		mental briefs addressing the Eighth Circuit's recent decision in Wagner v. Jones, 758 F.3d 1030 (8th Cir. 2014). These supplemental briefs may be in the form of letters to the clerk of court, shall be no longer than 5 pages or 1,400 words and shall be submitted no later than Monday, February 2, 2015. The parties shall file the supplemental briefs electronically without submission of paper copies. [9396221] (SM) [Entered: 01/26/2015 03:47 PM]
		* * * * *
02/02/2015	32	Submitted (ECF) Letter Brief for review. Submitted by Appellant Rocky Dietz. Date of service: 02/02/2015. [9406070] [13-35377]— [COURT UPDATE: Attached corrected brief. 02/06/2015 by RY] (Angel, Geoffrey) [Entered: 02/02/2015 06:32 PM]
02/02/2015	33	Submitted (ECF) Letter Brief for review. Submitted by Appellee Hillary Bouldin. Date of service: 02/02/2015. [9406165] [13-35377]— [COURT UPDATE: Attached corrected brief and backdated

		entry to reflect correct filing date. 02/03/2015 by TL] (Beaudette, Jesse) [Entered: 02/03/2015 07:49 AM]
		* * * * *
02/04/2015	35	ARGUED AND SUBMITTED TO RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA. [9408546] (KM) [Entered: 02/04/2015 10:47 AM]
		* * * * *
07/24/2015	37	[9621025] FILED OPINION (RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA) AFFIRMED. Judge: RCF Authoring Judge: CTB Concurring. Filed and entered judgment. [9621025]—[Edited 07/24/2015 by RP] (RMM) [Entered: 07/24/2015 07:20 AM]
07/24/2015	38	Filed memorandum (RAYMOND C. FISHER, CARLOS T. BEA AND MARY H. MURGUIA) AFFIRMED. [9621032] (RMM) [Entered: 07/24/2015 07:26 AM]
08/18/2015	39	MANDATE ISSUED. (RCF, CTB and MHM) [9650529]-

		(RL) [Entered: 08/18/2015 09:58 AM]
10/15/2015	40	Received notice from the Supreme Court: petition for certiorari filed on 10/09/2015. Supreme Court Number 15-458 [9718879] (RL) [Entered: 10/15/15 8:21 AM]
01/20/2016	41	Received Supreme Court order dated 01/19/2016. The petition for a writ of certiorari is granted. Supreme Court No. 15-458 [9834327] (RL) [Entered: 01/20/2016 04:38 PM]

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
(BUTTE)

No. 2:11-cv-00036-RWA

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

DOCKET ENTRIES

DATE	DKT NO.	PROCEEDINGS
07/13/2011	1	NOTICE OF REMOVAL by Hillary Bouldin from Eighteenth Judicial District, Gallatin County, case number DV-102A., filed by Hillary Bouldin (Attachments: #1 Complaint, #2 Answer, #3 Dietz Answers and Responsed to Bouldin's First Discovery, #4 Civil Cover Sheet) (CRM,) (Entered: 07/13/2011)
		* * * * *
07/15/2011	3	COMPLAINT against Hillary Bouldin, filed by Rocky Dietz. (State Court Filing) (CRM,) (En-

tered: 07/15/2011)

07/15/2011	4	ANSWER to 3 Complaint with Jury Demand by Hillary Bouldin. (State Court Filing) (CRM,) (Entered: 07/15/2011)
07/20/2011	5	ORDER REFERRING CASE to Magistrate Judge Richard W. Anderson. Signed by Chief Judge Richard F. Cebull on 7/20/2011. (EMA) (Entered: 07/20/2011)

* * * * *

08/09/2011	8	CONSENTS TO USMJ. (CRM,) (Entered: 08/09/2011)

* * * * *

04/16/2013	82	Minute Entry for proceedings held before Richard W. Anderson: July Trial held on 4/18/2013. Hearing commenced at 9:00 a.m. with cnsl Geoffrey Angel for Pla and Jesse Beaudette for Dft. 27 prospective jurors present. Clerk administers the first oath to prospective jurors. Clerk calls 13 names in the box. Introductions are made by the Court. Court addresses jurors regarding the case and conducts voir dire. Voir dire is conducted by ea cnsl. Court is recessed and challenges made in chambers and on the record. All present in courtroom and Clerk reads the names of the 7 se-

lected jurors. Clerk administers the 2nd oath to selected jury. Opening stmts by ea cnsl. Exh 101, 102, 103, 106, 108, 110 and 112 admitted w/no obj. Pla has depo of witness Dr. Vallim read. Exh 107 is admitted w/obj to letter only. Noon recess at 11:45. All present in court at 1:00. Pla witness Dietz S/E. Dft Exh 507 (photos) admitted. Dft Exh 506 admitted w/obj. Dft. Exh 503 admitted w/obj. Dft Exh 505 admitted w/obj subject to redction. Dft Exh 509 admitted w/no obj subject to redaction. Court concluded at 4:40 p.m to begin on 4/17/13 at 9:00 a.m. Jury excused and Court in recess. (Court Reporter Ann Wayrynen.) (ELL,) Modified on 4/18/2013 (ELL,). (Entered 04/18/2013)

04/17/2013	84	Minute Entry for proceedings held before Richard W. Anderson: Day Two of Jury Trial held on 4/17/2013. Hearing commenced at 9:00 a.m. with all present in courtroom w/jury. Cont. of exam of witness Dietz. Pla witness Bouldin S/E. Pla witness Dr. Capps S/E. Pla rests at 9:50 am. Dft witness Dr. Capps S/E. Dft. Exh 501 admitted w/redactions w/obj. Dft Exh 502 admitted subject to redactions w/obj. Dft Exh 504 admitted w/obj.

		On record w/o jury. Pla moved for mistrial and court denies. Dft rests at 1:30 pm. Cnsl to chambers to settle jury instructions. In court w/all present and Court gives jury instructions. Closing arguments by ea cnsl. Clerk adm oath to Bailiffs. Jury deliberates. In court and on the record w/o jury and pla motions for mistrial and court denies. Pla Exh 104 and 114 are admitted by stipulation. In court and on the record w/jury question. All present w/jury verdict. Court publishes. Court sends jury back into deliberations as verdict is rejected and jury is instructed. Court recesses and jury will resume deliberations at 9:00 am. (Court Reporter Kathy Hilton.) (ELL,) (Entered: 04/18/2013)
04/18/2013	83	ORDER for Meals and Lodging Signed by Richard W. Anderson on 4/18/2013. (CRM,) (Entered: 04/18/2013)
04/18/2013	85	Minute Entry for proceedings held before Richard W. Anderson: DA[Y] THREE Jury Trial held on 4/18/2013. Hearing commenced at 9:40 and concluded at 9:45. In courtroom w/all present and jury on the record. Clerk publishes verdict and jurors are excused. Court re-

		cesses. (Court Reporter Ann Wayrynen.) (ELL,) (Entered: 04/18/2013)
		* * * * *
04/18/2013	88	JURY VERDICT 2. (Attachements: #1 Jury Verdict) (ELL,) (Entered: 04/18/2013)
		* * * * *
04/18/2013	93	CLERK'S JUDGMENT in favor of Rocky Dietz against Hillary Bouldin (ELL,) (Entered: 04/18/2013)
05/02/2013	94	NOTICE OF APPEAL by Rocky Dietz. Filing fee $455, receipt number 0977-1231076. (Attachments: #1 Exhibit Representation Statement) (Angel, Geoffrey) (Entered: 05/02/2013)
		* * * * *

GALLATIN COUNTY DISTRICT COURT

No. DV-16-2011-0000102-NE

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

DOCKET ENTRIES

DOC. SEQ.	ENTERED	FILED	TEXT	JUDGE
1.000	01/27/2011	01/27/2011	Complaint	Brown, Holly B.
		* * * * *		
4.000	04/18/2011	04/18/2011	Defendant's Answer and Jury Demand	Brown, Holly B.
		* * * * *		
19.000	07/14/2011	07/14/2011	Defendant Hillary Bouldin's Notice of Removal	Brown, Holly B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-36-BU-RWA

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

April 16, 2013

PARTIAL TRANSCRIPT OF PROCEEDINGS
VOLUME I

Before: Richard W. Anderson, US District Court Judge.

APPEARANCES

FOR THE PLAINTIFF

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* * * * *

[37] Q. Let me ask this: What were you doing that morning with your mother's vehicle?

A. I had just come from washing it over at Duds & Suds and was heading up to the gas station to fill it up before I left town. I was going to leave town that next morning. I was just trying to be the good son, one might say, and created a problem.

Q. So this is Sunday. You were going to leave Monday morning?

A. Correct. I was going to head back to the Bismarck/Mandan area. Monday morning was my plan.

* * * * *

[53] Q. But you are saying that all of the scheduled appointments you completed?

A. Correct.

Q. You just quit scheduling them?

A. Correct. I was going to get physical therapy when I came back from Missoula there, but I went ahead — well, I had an appointment set up, but I went ahead

and I canceled everything after I was sent out to Missoula to see Dr. Capps.

[54] Q. Let's talk about that. You and I went to Missoula. Why did you go there?

A. I was under court order.

Q. Okay. And you met a woman, Dr. Catherine Capps?

A. Correct.

Q. And tell us. What did she do?

A. What did she do?

Q. Yes.

A. She had a very, very, very, thorough exam that I was very, very, very pleased with. I looked at her as more of a friend.

Q. Okay.

A. I was very impressed with what she all done there. I was very, very — I had doctors that never put — over a period of time they put my neck and stuff together that weren't as concerned as this lady was.

Q. You understand that she wasn't there to treat you, but she was there to look at you for the defense?

A. Exactly. There was no treatment, but there was an exam that was just — I don't ever recall having an exam, whether it be Dr. Addy, Dr. Schmelka, any of my

doctors in the past, Dr. Woods. It was quite the exam, examination that she put me through.

Q. Okay. And she recommended some testing? You are aware of that?

[55] A. Correct. Quite a little testing, actually.

Q. Do you remember what was involved in it?

A. Not exactly. That's all over my education. Those words are way over my head, a lot of it. Everything from MRIs — I know x-rays, little things like that. But some of the stuff that she wants I have no clue.

Q. Spinal cord survey?

A. Yeah, exactly. What that all consists of, I have no idea.

Q. Did you get those tests done?

A. No, I did not.

Q. Why not?

A. I can't afford it.

Q. Did you have any additional treatment after this physical therapy I think in Mandan? Have you seen any other doctors since, I think it is, 2010, 2011?

A. Have I seen any doctors relating to the accident?

Q. Yes.

A. No. Dr. Capps was the last doctor I've seen.

Q. Do you agree that your physical therapy that you do at home, those exercises, has done wonders for your condition?

A. It helps me a lot.

Q. And where is your pain level along this spectrum say in the last month? Where are you getting to?

A. The six to eight range. This weather that has come [56] in since I've come back into the state hasn't helped my matters at all. The colder, the greater.

Q. And you want the opportunity to get these shots, the 15 shots that Dr. Vallin has recommended?

A. Correct.

Q. Do you know when you would do those shots?

A. Like I said earlier, if Dr. Vallin was here today, I would be more than pleased to get on the table for him.

THE COURT: Mr. Angel, I think we'll take a recess at this point for 15 minutes. We'll be recessed until 2:30.

You may step down, sir

THE WITNESS: Thank you.

(Whereupon, a brief recess is taken.)

THE COURT: Be seated, please.

We are back in session. Mr. Dietz is on the stand. You may go ahead.

MR. ANGEL: Thank you, Your Honor.

Q. Rocky, I'm going to move to a new subject. There was this discussion about other accidents and your low back. Is it true you were injured in an elevator accident in Las Vegas some months — maybe eight, ten months — before the car accident?

A. Yeah. That would be Halloween, by the way, of 2008.

* * * * *

[95] Q. If you look at Question No. 2, it says, describe any physical or mental limitations you have as a result of your condition. You wrote, walking, standing, sitting, driving, can't do any of this for any period of time, lots of pressure in neck and whole body hurts, correct?

A. That is correct.

Q. If you go down to Question No. 4, it says, do you have any additional illness or injury that you feel we should know about? If yes, describe the kind of illness or injury and the date that it occurred. You wrote, yes, over 1,000 stitches head to toe, fused neck, fused foot, bad back, hips, knees, ankles. Correct?

A. That is correct.

Q. If you look at page 11.

A. I'm there.

Q. Question No. 10, it asks about how your injury affects your ability to care for your personal needs. You

wrote, hard to get up, stiff, pain unbearable at times. Correct?

A. That is correct.

THE COURT: Counsel, at this time I think we'll take our second afternoon recess. Say ten minutes. We'll be in recess. You may step down.

[96] (Whereupon, a brief recess is taken.)

THE COURT: You may be seated. You may continue.

MR. BEAUDETTE: Thank you.

Q. Are you ready, Mr. Dietz?

A. Yes.

Q. If you look at Exhibit 505, page 15.

A. I'm there.

Q. That is your handwriting, correct?

A. That is correct.

Q. Starting from the top there you discuss how your hygiene ways had changed as of 2001, we are talking about, correct?

A. That is correct.

Q. You note that at that time that all in all your hygiene and appearance ways have changed a lot, where it

doesn't bother you to put a hat on, sweats, or robe for the day, same clothes and shower every other day. Correct?

A. That is correct.

* * * * *

[123] Q. Okay. Starting on the second line towards the right, overall he's doing much better, noting complete amelioration of his leg pain and significant reduction in his low back pain, correct?

A. That is correct.

Q. And on the very bottom of that page he notes that he encouraged you to remain compliant with the home exercises previously taught to you in physical therapy. Otherwise, I have no additional recommendations. Correct?

[124] A. That is correct.

Q. That's the last time you ever saw Dr. Vallin?

A. Other than when you and I saw him together.

Q. Correct. I mean as a treating doctor.

A. As a treating doctor, yes.

THE COURT: Counsel, I think this is a good breakpoint for the day. It's been a long day for the jury. They have been here since 8:00. I happen to know that. So we'll take our evening recess right now.

Jurors, one thing I want to do is cure a serious omission I made this morning. When I was making the intro-

ductions I neglected to introduce a very important person in the court, namely, my law clerk who sits over here behind the screen. The fact that she was behind the screen caused me to forget to introduce her. Her name is Kelly Harrington, and she's been a law clerk in this court for many years and is an invaluable resource officer.

Now, you'll be excused until 9:00 tomorrow morning. Please, as I said at the noon break, withhold attempting to decide the case even tentatively until it's submitted to you finally. Don't talk to anybody about the case or form any opinions. And let me know if anybody persists in trying to talk to you. Tell them that you are a juror.

I hope you have a pleasant evening. And tomorrow we are supposed to have something to eat waiting for you when you get [125] here, so you might want to be a little early.

You may step down.

THE WITNESS: Thank you.

THE COURT: Court is in recess.

(Whereupon, court is recessed for the day.)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-11-00036-BU-RWA

ROCKY DIETZ, Plaintiff

v.

HILLARY BOULDIN, Defendant

April 17, 2013

PARTIAL TRANSCRIPT OF PROCEEDINGS
VOLUME II

Before: Richard W Anderson, US District Court Judge.

APPEARANCES

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[130] MORNING SESSION, WEDNESDAY, APRIL 17, 2013

THE COURT: Morning, jurors.

JURY PANEL: Good morning.

THE COURT: The record will show that all the jury have returned this morning, all seven of them. They're in the box and ready to go; is that right?

JURY PANEL: (Heads nod)

THE COURT: Were you well treated this morning back there in the jury room?

JURY PANEL VOICES: Very well.

THE COURT: Thumbs up. Very good. Okay, Mr. Dietz is on the stand for the continuation of Cross-Examination.

MR. BEAUDETTE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BEAUDETTE:

Q. Good morning, Mr. Dietz.

A. Good morning.

Q. I want to pick up where we left off yesterday. And the first thing I want to talk about this morning is future injections; okay? I want to ask you to look at Page 109 of your deposition, which is up on top of the counter there in front of you.

A. I'm there.

Q. I want to look — We'll actually start on Page 108 at Line 20; okay?

[131] A. What line was that?

Q. Line 20 on Page 108. Okay, and I asked you the question, "So let me — You get the shots from Dr. Vallin, and then you are improved about 60 percent for three months." You said, "No." And then my question went on, "And then your pain starts to come back? Or is it after three months the pain is back?" You said, "After three, roughly three months, approximately three months. It's a temporary fix. I'll never go there again." Is that your testimony?

A. Correct.

* * * * *

[167] Q. And are you currently licensed to practice medicine?

A. Yes, I am in the state of Montana.

Q. Any other states?

A. Well, California I'm on inactive status because I plan never to go back there.

Q. Okay. And Dr. Capps, at any time during your testimony today, if you need to refer to your report or your file in front of you, please do so. Can you identify for the jury the medical records that you had reviewed. And I don't mean just identify each one, but just the providers, who they were from.

THE COURT: All right, we're now going to focus on the examination; right?

MR. BEAUDETTE: Yes.

THE COURT: I think this would be a good point to take a morning recess. We'll do so. Jurors, we will be in recess until 10:15. You can step down.

THE WITNESS: Okay, thanks. Can I just leave this here?

THE COURT: Yes.

[168] (Whereupon, a brief recess was held.)

THE COURT: Back in session. Dr. Capps is on the stand. You may continue, counsel.

MR. BEAUDETTE: Thank you, Your Honor.

Q. (BY MR. BEAUDETTE, continuing) Dr. Capps, we left off, I'd asked you if you could identify the providers that — whose medical records you had reviewed as part of your functions in this case in developing your opinions.

A. Okay, the first medical records I received included those from Bismark Surgical Associates, Dakota Physical Therapy, Pain Treatment Center Anesthesiologists, Regional Medical Center, Bozeman Deaconess Hospital, Bridger Orthopedic and Sports Medicine, Rocky Mountain Surgical Center, Desert Inn Medical Center in Las Vegas, Lake Mead Radiologists, which is also Nevada, Nevada Imaging Centers, University Medical Center of Southern Nevada, Billings Clinic, St. Vincent Hospital.

Q. And did those records include both pre-motor vehicle accident and post-motor vehicle accident records?

A. Yes, they did.

Q. And did you have a chance to review all those before you examined Mr. Dietz?

A. Yes, I did.

* * * * *

[197] Q. Now, as part of your exam of Mr. Dietz, he filled out a pain diagram; correct?

A. Yes, he did.

Q. And where did he identify his pain to be?

A. In his left buttock and the back of his left thigh.

Q. Did he indicate any other pains that he was alleging are related to this accident?

A. He implied his midline back pain was back to baseline.

Q. Okay. When you say his midline back pain, what are you [198] talking about?

A. The pain in his low back, directly over his back.

Q. Okay. And when you say back to baseline, what do you mean?

A. Back to how he was originally.

Q. Prior to the accident?

A. Prior to the accident.

Q. And did you perform a physical exam of . . . of Mr. Dietz?

A. Yes, I did.

Q. And with regard to the lumbar region, the left hip, the left leg, what did your exam reveal?

THE COURT: Counsel, I think before we get into that, we're going to take another brief recess at this point.

MR. BEAUDETTE: Okay.

THE COURT: Let's say until 11:15, 11:20, somewhere right in there. Jurors, for your own planning, we're going to have to take it, because of some other cases, an extended lunch break. We will be in recess for lunch from approximately a quarter to 12 until 1:30. You'll have that much time to be on your own. I just wanted to let you know that. But for now, we'll be in recess for five or ten minutes, whatever you need. You may step down.

(Whereupon, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: The record will show we are in the courtroom with counsel for the parties but outside the presence of the jury and [199] during a recess. Plaintiff has requested leave to file or to make an oral motion for mistrial based upon certain events that occurred yesterday. And I've granted that request. Mr. Angel, you may proceed.

MR. ANGEL: Thank you, Your Honor. The Plaintiff does move for a mistrial based on the violation of the Court's order *in limine* regarding the presentation of evidence of the use of Methadone. We do have one juror that's a pharmacist. It is the juror that can't hear very well; but with the seven jurors, there's undoubtedly going to be some or all of them that heard that. And like the mentioning of insurance, there's really no way to remove that and have a fair deliberation. So, on that basis, we move for a mistrial.

THE COURT: Mr. Beaudette.

MR. BEAUDETTE: Your Honor, it was an inadvertent mention of Methadone. And the phrase was in his own handwriting. It analyzed Methadone, and there was nothing indicating that he was taking it for any improper reason, anything other than for treatment. I didn't imply that he was abusing it, anything along those lines.

THE COURT: Yeah. Well, it was unfortunate and it was in violation of the Court's order, but I accept coun-

sel's word that it was inadvertent. The jury was instructed to disregard both the question and the answer, and counsel for defense also withdrew the question, all on the record and in the presence of the jury. The error was — I'm going to treat it as harmless. I don't think it [200] will affect the outcome of the trial one way or the other. It was not prejudicial and therefore the motion for mistrial is denied.

MR. BEAUDETTE: Thank you, Your Honor.

(Whereupon, a brief recess was held. Thereafter, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: We're back in session. Counsel, you may proceed.

MR. BEAUDETTE: Thank you, Your Honor.

Q. (BY MR. BEAUDETTE, continuing) Dr. Capps, we were just beginning to discuss your examination of Mr. Dietz with regard to low back, left buttock and hip, and left leg pain. Can you please explain to the jury what you found on your examination of Mr. Dietz with regard to those conditions?

A. Okay. As I mentioned, I usually start with all the standing up, walking stuff. And he had a slight left limp. He was able to toe-and-heel walk, which also tests muscle power. But it caused increased pressure over the back side of his left hip. And then there's some balance testing, which was okay. And he did not have any hip weakness. The right buttock, when you look from above, it looked a little smaller. But from the back, it looked the

same. Because of the neck issues, I examined the neck. I don't know if you want me to say the pertinent findings there.

Q. No.

* * * * *

[212] MR. ANGEL: I have no additional questions of this witness.

THE COURT: All right. Anything further?

[213] MR. BEAUDETTE: No, Your Honor.

THE COURT: Well, it looks like you're going to be limited to half a day.

THE WITNESS: Oh, gosh.

THE COURT: You may step down, and may she be excused?

MR. BEAUDETTE: Yes, Your Honor.

THE COURT: All right. Jurors, as I told you a bit earlier, we'll be in recess now for lunch until 1:30. Please, as usual, refrain from trying to reach any decisions about this case at this point. And by all means, don't talk to each other or anyone else about it. With that, you're excused for lunch. We are in recess.

(Whereupon, a recess was held for lunch.)

THE COURT: Afternoon, jurors. All made it back, in the box ready to go. We'll have the afternoon session. Mr. Beaudette, you may proceed.

MR. BEAUDETTE: Well, Your Honor, Dr. Capps was our last witness. The Defense will rest.

THE COURT: Any rebuttal?

MR. ANGEL: No rebuttal, Your Honor.

THE COURT: Well, you know what that means, the testimony is over. I have to meet with the attorneys, and we'll do this off the — or outside the courtroom, outside your presence. But I have to meet with the attorneys for the purpose of preparing the Court's instructions to the jury. And it's the instructions that will give [214] you the law that you're to apply in making your deliberations. After we have settled those instructions, we'll come back into court — you'll be in recess in the meantime — and I will read them to you. We'll be giving you each your own personal copy of the instructions as well to take into your deliberations.

The counsel will then be able to argue the case to you yet this afternoon, make their final arguments. And this case will be submitted to you for your deliberations sometime around mid-afternoon I'm guessing. Maybe a little later than that. If you cannot reach a verdict by the hour of 5:00, I will excuse you for the evening and you can return to your deliberations tomorrow morning. If you have reached a verdict by or before 5:00 this afternoon, the case will be over and you are permanently excused. That's the program for here on out. So, I'll see counsel in chambers along with the court reporter. And the jury, in the meantime, is in recess until further notice.

(Whereupon, the following proceedings were held in chambers with all counsel present outside the presence and hearing of the jury:)

THE COURT: Record will show that we are in chambers with counsel, outside the jury's presence, for the purpose of settling instructions. I have given to each counsel a set of Court's proposed instructions numbered 1 through 20. This will be counsel's opportunity to make their record on those proposed instructions along with any of their offered instructions which the Court has chosen to delete. Rather than going through these instructions one by one and [215] making a separate record as we go to each one, I'm simply going to ask the counsel what their objections are to the charge, if any, and to then at that point pick out those instructions which are objectionable in counsel's view and state the objections. We'll start with Plaintiff's counsel, and then Defense counsel will have the same opportunity. As to the whole set, not one by one, go ahead, Mr. Angel.

* * * * *

[217] THE COURT: What are we going to do about these exhibits that have yet to be put into final form? Do we need to do that?

MR. ANGEL: They're both redacted. I haven't reviewed his redactions. So, Plaintiff's are ready. I have to — I've been provided with a binder, but I haven't had a chance to look at it.

THE COURT: Okay. How about if we go ahead and argue the case? I think you can argue the case without that — those being in their final form; can't you?

MR. BEAUDETTE: Yes, Your Honor, I can.

MR. ANGEL: Yes, Your Honor.

[218] THE COURT: And at that point we will send the jury in for their deliberations. And while they're deliberating, we — We won't send them with the exhibits quite then. It might take a half an hour or so; but shortly thereafter, we'll have the clerk go in there and say, "Here are the exhibits. "

MR. ANGEL: Okay.

THE COURT: Would that be all right?

MR. BEAUDETTE: Yes, Your Honor.

THE COURT: Do you think you can argue the case without them?

MR. BEAUDETTE: Yes.

MR. ANGEL: Yes, Your Honor.

THE COURT: Okay. Well, what is it? It's a quarter — Let's take 15 minutes just to give you a moment to collect your thoughts a little more, and we'll argue at 2:00. I will read the instructions at 2:00.

MR. BEAUDETTE: Okay.

THE COURT: And then you'll argue immediately thereafter.

MR. ANGEL: Understood. I do have one question along that line. And this is probably a dumb question. I have done trials before. Do I get a rebuttal closing?

THE COURT: Yes, you do.

MR. ANGEL: Okay.

THE COURT: Do I need to place a time limit on you guys?

MR. BEAUDETTE: Mine is going to be pretty short, Your [219] Honor.

MR. ANGEL: I'll be ten minutes and five minutes or 15 minutes and five minutes.

THE COURT: Well, you certainly can take longer than that. But no, I won't place any time limits on you. But you get a rebuttal, but you know what the rules are. Has to be rebuttal.

MR. ANGEL: Yes.

THE COURT: Okay. That's it.

MR. ANGEL: All right.

MR. BEAUDETTE: All right, thank you.

THE COURT: See you in open court.

(Whereupon, a brief recess was held. Thereafter, the jury entered the courtroom, and the following proceedings were held with all counsel and the parties present within the presence and hearing of the jury:)

THE COURT: The record will show counsel and the jury and parties are all present in open court. Ladies and gentlemen, this is the time, as I explained, for the Court to give you your instructions as to the law that you're to

apply in reaching your verdict. For some reason that I have never understood, I'm required to read these to you even though I know that you're perfectly capable of reading and understanding them yourselves. But the law does say that a judge has to read the instructions to the jury. And so, I'll do that; but I'll read through these rather rapidly. Don't worry if you're not quite following me, because you will be each given your own personal [220] copy of the instructions.

* * * * *

[226] Those, ladies and gentlemen, 20 of them, that completes the [227] instructions of the Court. Very shortly, within the next 20 or 30 minutes, we will be sending into the jury room for you the exhibits, which have been introduced into evidence in this case. You will not take them immediately, but they'll come to you very quickly. You will take your personal copies of the Court's instructions with you. And you may begin your deliberations following the arguments of counsel, immediately following the arguments of counsel. Mr. Angel.

* * * * *

[245] THE COURT: All right, jurors, you know, for a day and a half now I've been telling you not to decide this case, to just stay where you are, neutral. Now is the time to begin to decide it. You will go into the jury room for your deliberations. Nobody can be in there with you. Nobody can tell you what to do. Nobody can listen to what you say. Nobody can watch you. You are totally, totally on your own in absolute secrecy and in silence. There are no cameras in there, no microphones in there. Speak freely in your conversations with each other. It is totally up to you now. And nobody, even myself nor any-

one else, can pretend to tell you what your verdict ought to be.

You will be given a verdict form. And it's a very short form with one blank. And the blank is how much? That will be your function. That will be your purpose. And that will be your verdict. How much? How many dollars? What's fair and what's right from the evidence you've heard? And that's it. When you reach that number unanimously, you have reached your verdict. If you are unable to reach a verdict by, say, a quarter to five or thereabouts, I will be excusing you until tomorrow morning to continue your deliberations. I want you to have plenty of time and not feel hurried. With that, the jury may retire to its deliberations.

[246] Oh, and swear the bailiff. She has to go ahead and do that.

THE CLERK: Okay, bailiffs, come forward.

THE COURT: How many bailiffs do we have?

THE CLERK: We have four.

THE COURT: Four bailiffs. That should be enough.

THE CLERK: Yep.

(Whereupon, the bailiffs were sworn to take charge of the jury. Thereafter, the jury left the courtroom, and the following proceedings were held with all counsel and the parties present outside the presence and hearing of the jury:)

THE COURT: Mr. Angel, you have a motion. We're outside the presence of the jury now. They've retired to their chambers. We're in open court.

* * * * *

[247] (Whereupon, a recess was held pending return of the jury.

Thereafter, the following proceedings were held with all counsel [248] present outside the presence and hearing of the jury:)

THE COURT: Record will show we are in the courtroom outside the jury's presence to consider a note the jury has sent in to us at 3:35 p.m. And it's signed by one of the jurors. I cannot make out from the signature which one it is. In any event the question reads as follows: "Has the $10,136 medical expenses been paid; and if so, by whom?" Question mark. I propose to answer that by saying it is not permissible for the Court to provide this information, and it is not germane really to the jury's job of reaching a verdict. Any objection to that?

MR. ANGEL: No, Plaintiff would agree.

MR. BEAUDETTE: No, Your Honor.

THE COURT: What I'm wondering — Let's just do a little speculating on our own. If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial. Do you think they understand clearly, after the argument and the instructions, that their verdict may not be less than that amount?

MR. BEAUDETTE: I would think so, Your Honor.

THE COURT: I would too.

MR. BEAUDETTE: And I thought I made it crystal clear that they have to award that amount and that they should award that amount.

THE COURT: I agree. I regret, for the moment, that I [249] didn't include an instruction as a matter of law saying that that sets the floor. But then, for some people, that sets the ceiling. I would like to avoid that. I don't know where this is going to lead; but I think, for the moment at least, I'll ask the clerk, Erika, to answer the question in writing so we don't have to bring them all in here.

THE CLERK: Uh-huh.

THE COURT: And simply say at the bottom of the same note, "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." And you just let me initial that, and you can trot it back in there.

THE CLERK: Okay. I have, "The Court cannot provide this information. It is not germane to the jury's verdict."

THE COURT: In any event.

THE CLERK: In any event, okay. Okay.

THE COURT: Okay, let me initial that, and get it back in there. Counsel satisfied with the way this has been handled?

MR. BEAUDETTE: Yes, Your Honor.

MR. ANGEL: Yes, Your Honor.

THE COURT: Okay.

(Whereupon, recess continued pending return of the jury.[)]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35377

ROCKY DIETZ, Plaintiff-Appellant

v.

HILLARY BOULDIN, Defendant-Appellee

MEMORANDUM*

Before: FISHER, BEA and MURGUIA, Circuit Judges.

Rocky Dietz appeals from a judgment awarding him $15,000 in damages for injuries stemming from an auto collision.[1] We affirm.

1. Although Bouldin's counsel violated the order in limine prohibiting mention of Dietz's past methadone use, given the limited nature of the breach, and because the district court promptly issued a curative instruction, the district court did not abuse its discretion when it concluded the violation of its order was not prejudicial.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[1] We address Dietz's argument that the district court erred by re-calling the jury after dismissal in an opinion filed concurrently with this memorandum disposition.

See United States v. Randall, 162 F.3d 557, 559 (9th Cir. 1998). Furthermore, the district court did not clearly err by concluding that Bouldin's closing summation did not violate the order in limine prohibiting argument that Dietz was motivated by secondary gain. *See Lasar v. Ford Motor Co.*, 339 F.3d 1101, 1115 (9th Cir. 2005). Therefore, the district court did not abuse its discretion in denying Dietz's motions for mistrial on either of these grounds. *See id.*

2. Because Dietz's motion for summary judgment was denied based on a disputed issue of fact that was subsequently resolved at trial, we lack jurisdiction to review the denial. *See Banuelos v. Const. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004).

AFFIRMED.